IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1546

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH and CLAUDE MEADOW,
Petitioners

v.

JOHN BRIGGS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETER MEGARGEE BROWN
EARL H. NEMSER
Attorneys for Petitioners
One Wall Street
New York, New York 10005

Of Counsel:

CADWALADER, WICKERSHAM & TAFT
ROBERT L. SILLS

TABLE OF CONTENTS

Table of Authorities

Cases:

Constitutional Provisions, Statutes and Rules:

IN THE

Supreme Court of the United States

October Term, 1977

No. .....

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH and CLAUDE MEADOW,

Petitioners,

v.

JOHN BRIGGS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals (App. A, pp. 1a-19a) is reported at 569 F.2d 1. The memorandum opinion and order of the district court (App. B, pp. 20a-24a) is reported at 384 F.Supp. 1228. A corrective order of the district court and order of final judgment (App. C, pp. 25a-27a) are unreported.

Jurisdiction

The judgment of the court of appeals (App. D, p. 28a) was entered on September 21, 1977. A timely petition for rehearing with a suggestion for rehearing *en banc* was **denied on December 1, 1977 (Apps. E and F, pp. 29a-30a). On February 23, 1978 petitioners' time to file this petition** was extended until April 30, 1978 (App. G, p. 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1354(1).

Questions Presented

1. Whether Section 2 of the Mandamus and Venue Act of 1962 grants the United States district courts nationwide personal jurisdiction over federal officials sued for damages in their private individual capacities for acts allegedly performed under color of law.

2. Whether such a grant of personal jurisdiction violates the due process clause of the fifth amendment.

Statute and Constitutional Provisions Involved

The statute involved is Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e):[1]

> "A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a

1. The statute was amended by Act of Oct. 21, 1976, Pub. L. No. 94-574 §2, 90 Stat. 2721-2722. The amendment does not bear on the questions presented.

> defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The constitutional provision involved is the fifth amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement

Respondents, individuals who were subpoened to testify before a grand jury in the Northern District of Florida in July, 1972, brought this suit seeking damages for alleged violations of their constitutional rights. Six of the Respondents were indicted by that grand jury.

Petitioners, all residents of Florida, are William H. Stafford, Jr., then United States Attorney for the Northern District of Florida (now United States District Judge for

the Northern District of Florida), Stuart J. Carrouth, then Assistant United States Attorney for the Northern District of Florida (now in private law practice in Florida), and Claude Meadow, a Special Agent for the Federal Bureau of Investigation assigned to duty in Florida.

Respondents claim that petitioners, while participating in the grand jury proceeding, knew of false testimony given before the District Judge in Florida by defendant below Guy Goodwin, an attorney with the Department of Justice. Mr. Goodwin is alleged to have falsely testified that there were no government informants among the grand jury witnesses who were represented by counsel. Respondents' complaint alleges, *inter alia,* that petitioners violated respondents' first, fourth, fifth, sixth, eighth, and ninth amendment rights by permitting such false testimony; that the grand jury would not have indicted the six respondents if it knew of the false testimony; and that the concealed presence of a government informant in the "defense camp" deprived respondents of sixth amendment rights. Respondents each seek $100,000 punitive and $50,000 compensatory damages from petitioners in their private individual capacities. Jurisdiction was based upon 28 U.S.C. §§ 1331, 1332, 1343, 1651, 2201 and 2202. Respondents served their summons and complaint upon petitioners by certified mail in Florida.

The district court granted petitioners' motion to dismiss the complaint for want of personal jurisdiction, improper venue and insufficiency of service of process. The court of appeals reversed and denied petitioners' motion for rehearing. It held that petitioners were subject to personal jurisdiction in the district court, notwithstanding their lack of "presence" in or "minimum contacts" with the District of Columbia, merely because petitioners were served with process in the manner specified in Title 28, Section 1391(e).

Reasons for Granting the Writ

The Court of Appeals has Decided an Important Federal Jurisdictional Question Which Should be Settled by This Court Without Delay

The court of appeals held that Title 28, Section 1391(e) provides more than a mechanism for service of process; it subjects federal officials sued in their private individual capacities for damages alleged to arise from official conduct to unlimited nationwide personal jurisdiction, notwithstanding the absence of any nexus between the official or the alleged wrong and the chosen forum. This is the most radical departure to date from the standards governing personal jurisdiction established by Congress and this Court. *See infra* at 14, n. 9.

The impact of this decision is heightened when viewed against developments, subsequent to the enactment of Section 1391(e), which have increased the number and broadened the scope of damage suits against federal officials in their private individual capacities.

When the Mandamus and Venue Act of 1962 was enacted, such suits were not brought in the federal courts for two reasons. First, federal officials were held absolutely immune from suit in personal damage actions grounded in their official conduct. *E.g., Barr* v. *Matteo,* 360 U.S. 564 (1959). Second, there was then no federal analogue to 42 U.S.C. § 1983, which imposes damage liability upon those who, under color of state law, deprive persons of federal rights. Thus, in 1963 this Court said in *Wheeldin* v. *Wheeler,* 373 U.S. 647:

> "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.*** Federal law, however, supplies the defense,

> if the conduct complained of was done pursuant to a federally imposed duty*** or immunity from suit. *** Congress could, of course, provide otherwise, but it has not done so. Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. *** But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed." *Id.* at 652.

At that time suits in the federal courts were brought against federal officials in their official capacities or, in a limited category of cases where the relief sought was in essence against the United States, nominally in their personal capacities for actions taken under color of law. As the House Judiciary Committee Report on the Mandamus and Venue Act of 1962 explained, the latter category comprised:

> "cases where the action is *nominally* brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also *in essence against the United States* but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity." H.R. Rep. No. 536, 87th Cong., 1st Sess. at 4. *See* S. Rep. No. 1992, 87th Cong., 2d Sess., at 3 (hereinafter "H. R. Rep." and "S. Rep."). [Emphasis added.]

See also Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). While some of these cases sought damages, any award would be paid from the United States Treasury.[2] These are the suits for money judgments—

2. *E.g., Roberts* v. *United States,* 176 U.S. 221 (1900); *Kendall* v. *United States,* 37 U.S. (12 Pet.) 524 (1838); *Clackamas County* v. *McKay,* 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot,* 349 U.S. 909 (1955).

"nominally" against the individual and "in essence against the United States"—which were considered by Congress when it enacted Section 1391(e).

After the enactment of Section 1391(e), this Court held in *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), that violations of the fourth amendment give rise to damage actions against federal officials in their private individual capacities. Furthermore, the absolute immunity doctrine has been eroded in the lower federal courts. *See, e.g., Economou* v. *Butz,* 535 F.2d 688 (2 Cir. 1976), *cert. granted,* Dkt. No. 76-709. These developments set the framework for the suit below.

The court of appeals' holding that Section 1391(e) applies to suits against federal officials in their private individual capacities cannot be squared with the fact that when Congress enacted the statute, these developments had not yet occurred and this type of suit could not then be maintained in the federal courts.

There is nothing unusual about subjecting federal officials to nationwide personal jurisdiction in the suits described in the House and Senate Committee Reports. Nationwide jurisdiction over officials sued in their official capacities ordinarily exists by reason of nationwide "official presence" through the "hierarchy of command" and has nothing to do with the Mandamus and Venue Act of 1962. *E.g., Strait* v. *Laird,* 406 U.S. 341, 345 (1972). Section 1391(e) merely provides a mechanism for service of process, otherwise unavailable, to effect such personal jurisdiction. *E.g., Martinez* v. *Seaton,* 285 F.2d 587, 589 (10 Cir. 1961).

If Section 1391(e), by its own force, confers nationwide jurisdiction over officials sued for damages in their private individual capacities, the consequences for federal officials are extreme. Federal officials, unlike others, will be forced to defend their personal assets in jurisdictions with which

they have no contact and far from their homes. Opening so wide a door to federal litigation against officials in inconvenient forums by anyone who feels aggrieved by official conduct is readily subject to abuse. Indeed, since *Bivens* a rash of such actions has arisen in which personal jurisdiction is sought to be predicated solely upon the service provision in Section 1391(e). *See infra* at 12-13; *see also* P. Bator, *et al., Hart and Wechsler's The Federal Courts And The Federal System* (2d ed.) (Supp. 1977) at 227.

The difficulties faced by officials performing their duties under the threat that they may be forced to bear the burden of defending their actions in court have long been recognized. *Barr* v. *Matteo, supra* at 571. These burdens can be devastating where the official must personally defend himself in distant forums.

The Committee Reports accompanying Section 1391(e) stated that in actions covered by this statute:

> "The government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. Attorneys are present in every judicial district. Requiring the government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition." H.R. Rep. at 3; S. Rep. at 3.

But when an official is sued for damages in his private individual capacity, and not nominally, this is not the case. Only in limited instances can the Department of Justice represent the official or retain private counsel on his behalf. 28 C.F.R. §§ 15.2, 15.3. Otherwise, the burden of defense far from home is more than a federal employee can fairly be expected to withstand. There is no indication that Congress intended the choice of public service as a career to exact such a cost.

In *Robertson* v. *Railway Labor Board,* 268 U.S. 619, 624, 627 (1925), this Court cautioned that exceptions to the general rules of personal jurisdiction must be clearly expressed by Congress and are not lightly to be assumed.[3] Neither the language nor the history of Section 1391(e) contains an expression of congressional intent that this statute have the far-reaching consequences permitted by the court below.

The Court of Appeals has Decided an Important Federal Jurisdictional Question in Conflict With Decisions of the Courts of Appeals for the Second and Ninth Circuits

The decision below conflicts with prior decisions of the courts of appeals for the Second and Ninth Circuits which held that (1) the service of process provision in Section 1391(e) cannot, standing alone, supply personal jurisdiction over federal officials not otherwise amenable to suit; and (2) Section 1391(e) is limited to suits which, prior to its enactment, could have been brought only in the District of Columbia.

1. In *United States ex rel. Rudick* v. *Laird,* 412 F.2d 16 (2 Cir.), *cert. denied,* 396 U.S. 918 (1969), a habeas corpus case, the court held that Section 1391(e) "is a venue provision as its title clearly specifies," *id.* at 20, and accordingly, its service of process provision could not, standing alone, provide personal jurisdiction for fundamental reasons. Judge Moore explained:

> "The concepts of personal jurisdiction and venue are closely related but nonetheless distinct. * * * Thus

3. In *Robertson* this Court interpreted a statute permitting suit in "any District Court of the United States" as meaning any court having personal jurisdiction under general rules then prevailing.

> venue deals with the question of which court, or courts, of those which possess adequate personal • • • jurisdiction, may hear the specific matter in question. In short, jurisdiction must first be found over • • • the persons involved in the cause before the question of venue can properly be reached.
>
> Therefore, in relation to Section 1391(e), that provision can be said to authorize suit in the Southern District of New York in the instant case if, but only if, the jurisdiction—personal and subject matter—otherwise exists." *Id.* at 20.

Rudick was cited by this Court to support its holding in *Schlanger* v. *Seamans,* 401 U.S. 487, 491 (1971).[4]

In *Marsh* v. *Kitchen,* 480 F.2d 1270 (2 Cir. 1973), the Second Circuit examined *sua sponte* whether any federal statute or rule conferred personal jurisdiction in a case similar to this. It said:

> "We have not found any federal statute or procedural rule which, either expressly or upon proper interpretation, authorizes extraterritorial service of process under the circumstances of this case." *Id.* at 1273 n. 8.

In *Smith* v. *Campbell,* 450 F.2d 829 (9 Cir. 1971), the Ninth Circuit held that "Section 1391 may not be utilized to confer jurisdiction, but can be in order to effectuate juris-

4. The *Rudick* holding is not limited to habeas corpus cases on the theory that 28 U.S.C. § 2241(a) is an exception to Section 1391(e). The habeas corpus statute empowers a court to issue the writ within its "jurisdiction," that is, against officials with requisite "presence." *Strait* v. *Laird, supra* at 345 n.2; *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 495 (1973). *Rudick* has been followed in the district courts in cases not involving habeas corpus. *E.g., Bertoli* v. *The Securities and Exchange Commission,* 77 Civ. 1450 (S.D.N.Y. 1/4/77). (App. H. p. 32a-36a); *Kipperman* v. *McCone,* 422 F. Supp. 860, 871 (N.D. Cal. 1976).

diction once it has attached." *Id.* at 834. *Powers* v. *Mitchell,* 463 F.2d 212 (9 Cir. 1972), similarly held that Section 1391(e), which also "extends jurisdiction to 'agencies,' does not allow a federal court to extend its jurisdiction to a local federal agency such as a selective service board which is not within the court's territorial jurisdiction." *Id.* at 213.

Under the principles established in the Second and Ninth Circuits, Section 1391(e) cannot vest a court in the District of Columbia with personal jurisdiction over petitioners here, who were federal officials stationed in Florida and who were not in any sense "present" in the District of Columbia. Section 1391(e) provides only for the manner of service; it is not an independent basis for personal jurisdiction.[5]

2. In *Natural Resources Defense Council* v. *TVA,* 459 F.2d 255 (2 Cir. 1972), the Second Circuit reviewed the legislative history of Section 1391(e), and held that it was inapplicable to a suit against the TVA and its officers. The court determined that Congress intended Section 1391(e) to apply to suits which could have been brought "with assurance only in the District of Columbia."[6] *Id.* at 259. *Accord, Liberation News Service* v. *Eastland,* 426 F.2d 1379, 1383-84 (2 Cir. 1970); *Sigler* v. *Levan,* No. 77-CA-35

5. Similarly, local statutes governing the manner of service do not provide independent bases for personal jurisdiction. *Compare* D.C. Code § 13-431 *with* D.C. Code § 13-423, where Congress recognized this fundamental distinction. *See Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F.2d 103, 109 (2 Cir.), *cert. denied,* 384 U.S. 931 (1966); 4 C. Wright & A. Miller, *Federal Practice and Procedure* at 205-206 (1969).

6. Indeed, the one time this Court discussed Section 1391(e), it said: "That section was enacted to broaden venue of civil actions which could previously have been brought only in the District of Columbia. *See* H.R. Rep. No. 536, 87th Cong., 1st Sess. 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2." *Schlanger* v. *Seamans, supra,* at 490 n. 4.

(W.D. Tex. 3/22/78) (App. I, pp. 37a-49a); *Rimar* v. *McCowan*, 374 F. Supp. 1179 (E.D. Mich. 1974).

In the *TVA* case, Judge Friendly observed that Section 1391(e) cannot be treated simply

> "as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." 459 F.2d at 257.

Because of an historical anomaly, the District Court for the District of Columbia was the only federal district court with jurisdiction to issue writs of mandamus. This, coupled with the requirement that department heads, often indispensible parties in mandamus actions, be served at the seat of government, limited venue to the District of Columbia. The Mandamus and Venue Act of 1962 contained two sections. Section 1, now codified as 28 U.S.C. § 1361, cured the first problem by granting all district courts jurisdiction to issue writs in the nature of mandamus. Section 2, now Section 1391(e), permitted service of process outside the District of Columbia upon officials who were previously amenable to service only in the District of Columbia. *Id.* at 258 n.6. It is submitted that Section 1391(e) was intended to do no more.

The rule in the District of Columbia Circuit now conflicts with the Second Circuit rule because, prior to the enactment of Section 1391(e), petitioners could have been sued in their private individual capacities wherever they could be found. They were not amenable to suit only in the District of Columbia. *Compare Nesbitt Fruit Products, Inc.* v. *Wallace*, 17 F. Supp. 141, 143 (S.D. Iowa 1936) *with Martinez* v. *Seaton, supra* at 589.

3. There are at least 17 suits in which the questions presented here are now being litigated.[7] Among these cases

7. App. J, p. 50a.

is *Driver* v. *Helms*, 74 F.R.D. 382 (D.R.I. 1977), now *sub judice* in the First Circuit (No. 77-1482).[8] Resolution of these issues now will aid the proper administration of justice.

The Court of Appeals has Decided an Important Constitutional Issue Which Should be Settled by This Court

The court of appeals held its interpretation of Section 1391(e) was not precluded by the due process clause of the fifth amendment, postulating that there are no limits upon the power of Congress under article III to define the jurisdictional reach of the federal courts. We submit that this article III power is limited by "traditional notions of fair play and substantial justice" similar to the limitations imposed by the due process clause of the fourteenth amendment upon the exercise of personal jurisdiction by the state courts. *E.g., International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

This issue, reserved in *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n.13, 818 (1948), has not been presented since *International Shoe* because, putting aside Section 1391(e), no federal law provides for personal jurisdiction in circumstances repugnant to fair play and substantial justice. As the court below observed (App. A, p. 17a, n.73), Congress has indeed provided for nationwide service of process in "a few clearly expressed and carefully guarded

8. The appellants in *Driver* include 25 federal officials of high office. The facts in *Driver* graphically illustrate the vexatious consequences of the decision below. Most of the defendants there were simultaneously sued in their private capacities in New York, San Francisco, Providence and the District of Columbia based, in part, upon the same allegations of unlawful mail opening. *Grove Press, Inc.* v. *C.I.A.* 76 Civ. 5509 (S.D.N.Y.); *Kipperman* v. *McCone, supra*; *Driver* v. *Helms, supra*: *Halkin* v. *Helms*, Civil No. 75-1773 (D.D.C.). The *Kipperman, Driver* and *Halkin* cases were brought as class actions.

exceptions to the general rule of jurisdiction *in personam.*" *Robertson* v. *Railway Labor Bd., supra* at 624. However, each such statute is carefully guarded by a protective mechanism, such as a restricted venue provision limiting available forums, which insures fairness to the defendants.[9]

The court of appeals reached its decision by theorizing that Congress could have created only one federal court, which as a practical necessity would have required nationwide service "clearly consonant with the Constitution." App. A, p. 16a. *See also Hart & Wechsler's The Federal Courts and The Federal System, supra* at 1106 *et seq.* This theory is flawed because it fails to recognize that while Congress' power to create inferior federal courts under article III may be permissive—"such inferior Courts as the Congress may . . . establish," the mandate of fifth amendment due process is absolute and limits the exercise of congressional power.[10] The question is not what Congress might have done in 1789, but whether it can now enact a statute repugnant to contemporary notions of fair play and substantial justice.

Rather than coming to grips with this issue, the court below merely begged the question. Since congressional power is limited by the due process clause, Congress could establish the single court hypothesized only if unlimited nationwide jurisdiction is constitutional. The claim that such a court might exist merely restates, but does not resolve, the issue presented.

The court of appeals rejected what it termed "apodictical" assertions of the Third and Fifth Circuits that personal

9. App. K, p. 51a sets forth the federal "nationwide service" statutes and indicates the manner in which they are restricted so as not to offend traditional notions of fair play and substantial justice.

10. For example, surely Congress could not justify the creation of standards of amenability to suit based on race by exercising its "plenary power" under article III.

jurisdiction in the federal courts is governed by a "fairness standard." App. A, p. 17a-18a n. 74. It distinguished the fairness limitations on state long-arm jurisdiction because such jurisdiction reaches beyond state territorial limits. In the federal sphere, it deemed "fairness considerations" inapplicable because jurisdiction does not reach beyond the territory of the United States. *Accord, Moriash* v. *Morrill,* 496 F.2d 1138 (2 Cir. 1974), decided before *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). *Compare Oxford First Corp.* v. *PNC Liquidating Corp.,* 372 F.Supp. 191 (E.D. Pa. 1974).

By rejecting fairness considerations because the petitioners were summoned within the United States, the court of appeals failed to recognize that *Shaffer* v. *Heitner* completely repudiated the rigid jurisdictional underpinning —territorial sovereignty—of *Pennoyer* v. *Neff,* 95 U.S. 714 (1877). *Shaffer* recognized that "the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined. . . ." 433 U.S. at 221. There, this Court held that although a court may have the necessary territorial power, the exercise of that power must be limited by traditional notions of fair play and substantial justice. The rationale of *Shaffer* should be applicable to questions of federal as well as state *in personam* jurisdiction.

The decision below might have been correct under the theory of *Pennoyer;* however, it cannot withstand analysis under *Shaffer. Shaffer* recognized fair play as the crucial element in the due process equation, sufficient to outweigh antiquated notions of the supremacy of territorial power.

Congress surely has territorial power over petitioners. However, only this Court can authoritatively decide whether the exercise of that power, as enunciated by the court of appeals' construction of Section 1391(e), is subject to fifth amendment due process limitations and whether these limitations require that fair play and substantial justice be afforded to petitioners.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: April 30, 1978

Respectfully submitted,

PETER MEGARGEE BROWN

EARL H. NEMSER

Attorneys for Petitioners
One Wall Street
New York, New York 10005

Of Counsel:

CADWALADER, WICKERSHAM & TAFT
ROBERT L. SILLS

APPENDIX A

JOHN BRIGGS ET AL., *Appellants,*

v.

GUY GOODWIN, INDIVIDUALLY AND AS ATTORNEY FOR THE DEPARTMENT OF JUSTICE, ET AL. [STAFFORD, ET AL.]

No. 75-1578.

UNITED STATES COURT OF APPEALS
District of Columbia Circuit.

Argued April 13, 1976.

Decided Sept. 21, 1977.

As amended Dec. 1, 1977.

Rehearing Denied Dec. 1, 1977.

• • •

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 74-803).

Doris Peterson, New York City, with whom Nancy Stearns, Morton Stavis, New York City, and Philip J. Hirschkop, Alexandria, Va., were on the brief, for appellants.

R. John Seibert, Atty., Dept. of Justice, Washington, D. C., with whom Robert L. Keuch and Benjamin C. Flannagan, IV, Attys., Dept. of Justice, Washington, D. C., were on the brief, for appellees. George W. Calhoun, Atty., Dept. of Justice, Washington, D. C., also entered an appearance for appellees.

Before MCGOWAN, ROBINSON and WILKEY, Circuit Judges.

Opinion for the Court filed by SPOTTSWOOD W. ROBINSON, III, Circuit Judge.

SPOTTSWOOD W. ROBINSON, III Circuit Judge:

During the summer of 1972, Guy Goodwin, an attorney in the Department of Justice, together with United States Attorney William H. Stafford, Jr.[1] and Assistant United States Attorney Stuart J. Carrouth for the Northern District of Florida, conducted therein grand jury proceedings at which appellants,[2] among others, were subpoenaed to appear. On motion by newly-retained counsel for appellants,[3] the District Judge responsible for those proceedings called Goodwin to the witness stand and inquired as to whether any of the "witnesses represented by counsel [were]agents or informants" of the Government.[4] Goodwin's sworn answer—"[n]o, Your Honor"[5]—is alleged to have been a knowing falsehood,[6] and its consequences to

1. Now United States District Judge for the Northern District of Florida.

2. Appellants were all members of the Vietnam Veterans Against the War/Winter Soldier Organization. Compare Brief for Appellees at 3 n. 1 with appellant's complaint ¶¶ 4-7, Appellants' Appendix (App.) 6-7.

3. According to the complaint, ¶¶ 10-12, App. 8-9, some of the subpoenas were returnable on the third succeeding day, and most of them compelled appearance at the same time; the witnesses summoned were as far away as Texas; and "[n]early all of the lawyers met their clients for the first time" only days before they were to appear. *Cf.* App. 20.

4. App. 27.

5. The transcript indicates, App. 20-23, that a list of the witnesses represented by counsel was read to the three prosecutors in open court and, on the following day, Goodwin was sworn, asked by the judge only the above question and excused without examination by any of the counsel. App. 27.

6. Complaint ¶¶17-18, App. 10. One of the witnesses is alleged to have been a paid informant and to have given to the Government information secured in the course of meetings with appellants and their counsel. Complaint ¶¶ 26-30, App. 12-13.

have been violative of various of appellants' constitutional rights.[7]

For redress of those consequences, appellants sued the three prosecutors and Claude Meadow, an agent of the Federal Bureau of Investigation,[8] "individually and in their official capacities"[9] in the District Court here. Each appellant sought a declaratory judgment, $50,000 in compensatory damages and a punitive award of $100,000.[10] Goodwin, whose official residence was then in the District of Columbia,[11] was served personally and the others, each of whom resided in Florida, were served by certified mail.[12] The Florida defendants seasonably requested transfer of the litigation to the Northern District of Florida[13] or, alternatively, dismissal for improper venue and insufficiency of process.[14] The District Court denied the former

7. Complaint ¶ 3, App. 6. Several violations of criminal statutes are also asserted and appellants, invoking 42 U.S.C. § 1985 (1970), charge that these violations were the result of a conspiracy to violate their civil rights. Complaint ¶ 34, App. 15.

8. Meadow was the alleged conduit between the informant and the other appellees. Complaint ¶ 27, App. 12.

9. Complaint ¶ 7, App. 7.

10. Complaint, App. 16.

11. The District Court so found. *Briggs* v. *Goodwin*, D.D.C., 384 F.Supp. 1228 (memorandum and order Nov. 20, 1974), App. 38. Appellees do not contest that finding. See Brief for Appellees at 3, 4 n. 2.

12. See notes 54-75 *infra* and accompanying text.

13. See 28 U.S.C. § 1404(a) (1970).

14. At the same time, Goodwin moved for dismissal on grounds of immunity both as a prosecutor and as a witness, but his motion was denied. See *Briggs* v. *Goodwin*, *supra* note 11, (memorandum and order Nov. 20, 1974), App. 35-37, *aff'd*,—U.S.App.D.C.—, 569 F.2d 1 (1977). Goodwin is not a party to this appeal.

motion but granted the latter,[15] and the question on appeal is whether this action may be entertained in the District of Columbia. We hold that it may.

15. The court rejected the motion to transfer on the grounds that venue in the District of Columbia was proper, adverting to "well established law that a plaintiff's choice of venue is given preference . . . ." *Briggs* v. *Goodwin, supra* note 11, (memorandum and order Nov. 20, 1974) (unreported), App. 38. On March 4, 1975, the court, repudiating that premise, issued the following additional order:

> Upon consideration of the Alternative Motion of Defendants Stafford, Carrouth and Meadow to Dismiss this Action as to them for Lack of Jurisdiction over their Persons, Improper Venue, Insufficiency of Process and Insufficiency of Service of Process, the memoranda of points and authorities in support thereof and in opposition thereto, it appearing to the Court that service of process upon said defendants was made by certified mail; that the Complaint fails to allege the defendants transacted any business in the District of Columbia or caused tortious injury to plaintiffs in the District of Columbia by an act or omission therein as required by District of Columbia Code § 13-423(a); that the action against said defendants could not have been brought in this Court prior to the enactment of 28 U.S.C. § 1391(e) and is not one in essence against the United States as required by § 1391(e); and that by reason thereof the Court lacks venue and *in personam* jurisdiction with respect to defendants Stafford, Carrouth and Meadow, service of process on them was insufficient, and the action as to these defendants should be dismissed, it is, therefore, by the Court this 4th day of March 1975:
>
> ORDERED that the Alternative Motion of Defendants Stafford, Carrouth and Meadow to dismiss this action be, and and the same hereby is, granted; and it is further
>
> ORDERED that this action be, and the same hereby is, dismissed as to defendants William H. Stafford, Jr., Stuart J. Carrouth, and Claude Meadow.

Briggs v. *Goodwin, supra* note 11, (order Mar. 4, 1975) (unreported), App. 39-40.

Whatever the merits of the venue determination, one must wonder why the District Court did not hold the motion for transfer in abeyance until it had decided whether the litigation could continue in the District. See *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 466-467, 82 S.Ct. 913, 915-916, 8 L.Ed.2d 39, 42 (1962) (transfer may be effected even absent personal jurisdiction over all parties in the transferor court, and in most cases is preferable to dismissal if the defect in venue can thereby be cured).

I

The propriety of venue in the District of Columbia is measured by 28 U.S.C. § 1391(e),[16] which in pertinent part provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, . . . may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides . . . .
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

This litigation, against four federal officials, was commenced in the district wherein one of them officially resided.[17] The complaint alleges constitutional depredations wrought by activities "in [their] official capacity or under color of legal authority."[18] The suit thus fits within the ostensible coverage of Section 1391(e). Appellees suggest a gloss upon the statutory language, however, excepting from its purview any case in which a money judgment may be returned against a federal officer, and to this suggestion the District Court apparently acceded.[19] Our exam-

16. 28 U.S.C. § 1391(e) (1970), as amended by Act of Oct. 21, 1976, Pub.L. No. 94-574 § 2, 90 Stat. 2721-2722. The 1976 amendment does not bear on the questions in this case.

17. See note 11 *supra*.

18. See text *supra* following note 16.

19. *Briggs* v. *Goodwin, supra* note 11, (order of March 4, 1975), reproduced at note 15 *supra*.

ination of the genealogy of the "Congressional English"[20] just set forth leads us to decline appellees' invitation.

The progenitor of Section 1391(e) was H.R. 10089,[21] a bill "[t]o permit a civil action . . . against an officer of the United States *in his official capacity* . . . in any judicial district . . . where a plaintiff in the action resides."[22] Asked for comments on the bill, the Department of Justice expressed reservations about its utility.[23] It explained that most suits against public officials, such as those seeking "damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority," were "against [him] in his individual capacity,"[24] and therefore outside the scope of the proposed legislation. On the other hand, the Department continued, any litigation "against a Government official . . . in his official capacity would be the equivalent of a writ of mandamus"[25] which, by virtue of a historical anomaly, no federal court outside the District of

20. *See Henderson* v. *Flemming,* 283 F.2d 882, 885 (5th Cir. 1960).

21. H.R. 10089, 86th Cong., 2d Sess. (1960).

22. H.R. 10089, 86th Cong., 2d Sess. (preamble) (1960) (emphasis added). This bill was in all pertinent respects identical to H.R. 10892, 85th Cong., 2d Sess. (1958), upon which no action was taken beyond referreal to committee. H.R. 10089 proposed that the following language be codified as 28 U.S.C. § 1391(e):

> A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides.

23. H.R. Rep. No. 1936, 86th Cong., 2d Sess. 6 (1960) (letter of Deputy Attorney General Lawrence Walsh).

24. *Id.*

25. *Id.*

Columbia could then issue.[26] Since H.R. 10089 would have conferred no mandamus jurisdiction and would not have applied to actions against officials "individually," the Department doubted whether its enactment "would serve any useful purpose."[27]

H.R. 12622[28] was drafted to meet these and other[29] criticisms. Its first section extended mandamus jurisdiction to all of the federal district courts.[30] Its second section broadened the prior venue proposal to include suits directed at a federal official's activity whether characterized as occurring "in his official capacity" or "under color of legal authority."[31] The purpose of the new bill was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government,[32] but who would previously have been compelled[33] to sue in the Dis-

26. Compare *M'Intire* v. *Wood,* 11 U.S. (7 Cranch.) 504, 3 L.Ed. 420 (1813), with *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838).

27. H.R. Rep. No. 1936, *supra* note 23, at 6.

28. H.R. 12622, 86th Cong., 2d Sess. § 2 (1960), in *id.* at 9.

29. The Judcial Conference of the United States proposed additions that subsequently were adopted as 28 U.S.C. §§ 1391(e)(1), (2), (3) (1970). *Id.* at 5 (letter of Warren Olney, III, Director, Administrative Office of the United States Courts). Appellants rely only on subsection (e)(1), quoted in text following note 15 *supra.*

30. This grant was the prototype for what is now 28 U.S.C. § 1361 (1970), enacted along with § 1391(e).

31. H.R. 12622, *supra* note 28, set forth in H.R. Rep.No.1936, *supra* note 23, at 9.

32. H.R.Rep.No.1936, *supra* note 23, at 3.

33. The House Report on H.R. 12622 focused on the time and expense involved in traveling to the District of Columbia to institute suit against officials or agencies located there, and the possibility that litigation commenced against agents in the field might be dismissed for want of venue over an indispensable superior located in Washington. H.R.Rep.No.1936, *supra* note 23, at 2-3.

trict of Columbia by the pre-existing venue provisions, which were deemed "contrary to the sound and equitable administration of justice."[34] And the House Report specifically noted that "[t]he venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."[35]

The House passed H.R. 12622[36] but the Senate adjourned before any action was taken on it. So, in the next Congress, it was reintroduced as H.R. 1960,[37] comments were again solicited, and again the Department of Justice asked that portions of the bill be "clarified."[38] Some proffered clarifications were adopted,[39] but notably the Department's suggestion that the venue provision be changed to "eliminate[] suits for money judgments against officers"[40] was not.

---

34. *Id.* at 3.

35. *Id.*

36. 106 Cong.Rec. 18405 (1960). *Cf.* H.R.Rep. No.536, 87th Cong., 1st Sess. 1 (1961).

37. H.R. 1960, 87th Cong., 1st Sess. (1961), 107 Cong.Rec. 12157 (1961); H.R.Rep.No.536, *supra* note 36, at 5-6. See *id.* at 1 ("[a]n identical bill, H.R. 12622, passed the House in the closing days of the 86th Congress but was not acted upon by the Senate").

38. S.Rep.No.1992, 87th Cong., 2d Sess. 6 (1962) (letter of Assistant Attorney General (now Justice) Byron R. White), U.S. Code Cong. & Admin.News 1962, p. 2784.

39. Compare *id.* at 1 with *id.* at 6-7. The Senate passed the bill as amended without revealing debate. 108 Cong.Rec. 18783-18784 (1962). The House passed the Senate version with one change, also responsive to the Justice Department's suggestions, 108 Cong.Rec. 20093-20094 (1962), and the Senate acquiesced. *Id.* at 20079. *Cf. Peoples* v. *United States Dep't of Agriculture*, 138 U.S.App.D.C. 291, 295 n. 9, 427 F.2d 561, 565 n. 9 (1970) (noting the importance of the selective adoption of the Department's proposed revisions).

40. S.Rep.No.1992, *supra* note 38, at 6, U.S. Code Cong. & Admin.News 1962, p. 2789.

Rather, both the House and Senate committees rejoined with the observation that the "venue problem" which the bill sought to rectify was as troublesome in damage suits against officials as in other sorts of civil litigation.[41]

This colloquy between the Department of Justice and the legislative draftsmen demonstrates the legislature's comprehension and resolution of the issue before us. The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest,[42] manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to harken to the will of Congress as expressed, and the statutory mandate is clear.

We realize, of course, that other courts have entertained divergent views on the relation of Section 1391(e) to damage actions against federal officials.[43] We acknowledge

---

41. *Id.* at 3; H.R.Rep.No. 536, *supra* note 36, at 3.

42. See note 39 *supra*.

43. The Fifth Circuit, in *Ellingburg* v. *Connett*, 457 F.2d 240, 241 (5th Cir. 1972), held that "Section 1391(e)(4) . . . may be a basis for venue" in a civil rights action "for damages and injunctive relief against officers . . . of the United States," and remanded for a determination as to whether the factual predicate—the plaintiff's residence in the district—could be satisfied. The dissent apparently agreed that an action for damages might normally be brought pursuant to its provisions, but regarded the damage claim there advanced as a sham. *Id.* at 242. See *Driver* v. *Helms*, 74 F.R.D. 382 (D.R.I. 1977). The District Court in this circuit has reached a similar result in a case involving alleged injury "as a result of defendants' fraudulent and defamatory statements, made in the course of their official duties," so long as federal employment continued to the time the action was filed. *Wu* v. *Keeney*, 384 F.Supp. 1161, 1168 (D.D.C. 1974). *Cf. Benson* v. *United States*, 421 F.2d 515, 517 (9th Cir.), *cert. denied*, 398 U.S. 943, 90 S.Ct. 1861, 26 L.Ed.2d 279 (1970) (semble); *Thompson* v. *Kleppe*, 424 F.Supp. 1263, 1266 (D.Haw. 1976) (semble). See also *Kletschka* v. *Driver*, 411 F.2d 436, 442 (2d

also that in *Relf* v. *Gasch*[44] we spoke to the subject in a manner that, in retrospect, seems susceptible of conflicting interpretation, but *Relf* does not clash with the result reached here. That case involved the propriety of a transfer of litigation to another district "for the convenience of parties . . . [and] in the interest of justice,"[45] and the complaint hinted that some defendants might be subject to liability not only for activities under color of legal authority but also for others of a purely personal character.[46]

Cir. 1969) (dicta); *Rabiolo* v. *Weinstein*, 357 F.2d 167, 168 (7th Cir. 1966) (dicta). On the other hand, *Paley* v. *Wolk*, 262 F.Supp. 640, 642-643 (N.D.Ill.1965), *cert. denied*, 386 U.S. 963, 87 S. Ct. 1031, 18 L.Ed.2d 112 (1967) found § 1391(e) unavailable to a plaintiff apparently alleging that certain employees of the Patent Office had taken money from him on false pretenses, since "the action would be against the defendants personally rather than in their official capacities," as did *Davis* v. *Federal Deposit Ins. Co.*, 369 F.Supp. 277, 279 (D.Colo. 1974), where damages were sought from an FDIC employee on grounds his negligence had facilitated the collapse of a national bank. Compare with these cases *Griffith* v. *Nixon*, 518 F.2d 1195, 1196 (2d Cir.), *cert. denied*, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975), and *Green* v. *Laird*, 357 F.Supp. 227, 230 (N.D.Ill.1973), each seemingly concluding that *venue* under § 1391(e) was proper but that that section did not affect service requirements, which were deemed unmet, a matter discussed *infra* at note 58. Perhaps *Paley* and *Davis* may be reconciled with *Wu* and *Ellingburg*, for from the reports in the former cases it is unclear whether the injurious action was alleged to have been taken under color of legal authority, and for aught that appears the courts may implicitly have found the activity to have been purely personal. *Cf. Griffith* v. *Nixon*, *supra*, 518 F.2d at 1196.

44. 167 U.S.App.D.C. 238, 511 F.2d 804 (1975).

45. 28 U.S.C. § 1404(a) (1970).

46. 167 U.S.App.D.C. at 240, 511 F.2d at 806. The plaintiffs in *Relf*, all minors, alleged that they were sterilized without their consent or the consent of their parents. They sued the United States—under the Federal Tort Claims Act, 28 U.S.C. § 1346(a) *et seq.* (1970)—and a group of individual defendants, all of whom were at one time federal officers or employees. *Id.* To be sure, each of the nine counts of the plaintiffs' complaint ceremoniously asserted that the individual defendants had acted within the scope of their offices

Those possibilities could not have been explored in the transferee district, for neither Section 1391(e) nor any other provision gave venue there,[47] and as a prerequisite to transfer "[v]enue must be proper in the transferee district"[48] for every defendant and on ever claim for relief.[49] Moreover, a transfer is conditioned as well on the amenability of all defendants "to the process of the federal court in the transferee district at the time the action was originally filed"[50] and, apart from the inefficacy of process available in that district for any defendant sued only in a purely personal role,[51] the fact that some defendants had left federal service prior to institution of suit "increase[d] the likelihood" that they were not subject to process emanating from the transferee court.[52] Consequently we remanded the case in order that the District Court might, by allowing amendments to the complaint, be afforded a reasonable op-

and employments. But there were allegations readable as charges of misconduct unconnected with official duty or authority, and these left us unsure whether the plaintiffs really intended that the alleged wrongdoers' status as government officials should figure operatively in all of their counts. 167 U.S.App.D.C. at 240-241, 511 F.2d at 806-807.

47. *Id.* at 241 & n. 15, 511 F.2d at 807 & n. 15, citing *Paley* v. *Wolk*, *supra* note 43, 262 F.Supp. at 642-643, in which federal employees were being sued for receiving money under false pretenses, but the receipt was apparently "unrelated" to their official duties.

48. *Relf* v. *Gasch*, *supra* note 44, 167 U.S.App. D.C. at 241, 511 F.2d at 807 (footnote omitted).

49. *Id.* at 241 n. 12, 511 F.2d at 807 n. 12.

50. *Id.* at 241, 511 F.2d at 807 (footnote omitted).

51. We noted in addition that the transferee state's long-arm statute would not reach such defendants. 167 U.S.App.D.C. at 242 n. 18, 511 F.2d at 808 n. 18.

52. *Id.* at 242, 511 F.2d at 808. This was the ground for the concurring opinion, which deemed § 1391(e) otherwise available. *Id. Cf. Kipperman* v. *McConc*, 422 F.Supp. 860, 876-877 N.D. Cal. 1976); *Wu* v. *Keeney*, *supra* note 43, 384 F.Supp. at 1168.

portunity to decide these weighty questions bearing on its power to transfer. Clearly, our presumption in *Relf*—that action brought against persons who just happen to be, or to have been, federal officials are not within the ambit of Section 1391(e)—is by no means incompatible with our present holding that venue for damage actions against those who inflict injury under color of legal authority is governed by that section.

To the extent, then, that the District Court held that Section 1391(e) furnishes no basis for venue here, it was in error. That does not end the matter, however, for the order appealed from is predicated also upon insufficient service of process upon appellees.[53] To that issue we now turn.

II

As we noted at the outset,[54] the Federal Rules of Civil Procedure govern service of process in cases laying venue under Section 1391(e), "except that the delivery of the summons and complaint to the officer or agency . . . may be made by certified mail beyond the territorial limits of the district in which the action is brought."[55] Appellees were served in just that manner which, they assert, was improper either because Congress did not intend the exception to apply to suits such as this one, or because such service is constitutionally deficient.

As for the first contention, the House Report on Section 1391(e) correctly noted that its expansion of venue would be of little avail unless coupled with a modification

53. *Briggs* v. *Goodwin*, *supra* note 11, (order of May 4, 1975), set out at note 15 *supra*.

54. See text *supra* at note 16.

55. 28 U.S.C. § 1391(e) (1970).

of service demands then levied by the Civil Rules.[56] Thus, while the amended section retains the rules intact for service within the forum district it empowers the district courts to make valid service outside the district whenever venue lies by virtue of Section 1391(e).[57] It also authorizes service by certified mail in such situations whenever service can be effected only beyond the boundaries of the forum district.[58] Nowhere is there any intimation that these

56. H.R.Rep.No.536, *supra* note 36, at 4.

57. See text *supra* following note 16 and note 58 *infra*.

58. See text following note 16 *supra*. As the House Report put it "[s]ince this bill is designed to make a federal official amenable to suit locally, the bill provides that [service on the official] may be made by certified mail outside of the territorial limits of the district in which the action was brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules. . . ." H.R. Rep. No. 536, *supra* note 36, at 4 (emphasis added). Appellees read the Report's assertion that "where an action is only nominally brought against an official . . . service may be had in the manner provided by rule 4(d)(5)," *id.*, to imply a "negative corollary" that the service provision of § 1391(e) applies only to that situation. Brief for Appellees at 27-28. This inference is negated by the very next sentence in the House Report, which clearly contemplates that the "exception to the territorial limitation on service provided in this bill" is "equally applicable" to cases other than those within the compass of Rule 4(d)(5), such as, presumably, this one. H.R. Rep. No. 536, *supra* note 36, at 4. Thus § 1391(e) invokes the clauses in Fed.R.Civ.P. 4(f) (specifying the "Territorial Limit on effective service") and Rule 4(d)(7) (service upon an individual defendant) providing for statutory exceptions to their dictates.

Appellants also urge that if service is made under Rule 4(d)(5) it is *per se* insufficient to bring an official's pocketbook into jeopardy. That Rule's only peculiarity is its direction that service be made not only upon the officer, but upon the United States as well. Appellants here apparently did serve the United States; yet if service upon the appellees was affected agreeably with § 1391(e), it is hard to see how the additional service might redound to their injury. To the extent that *Griffith* v. *Nixon*, *supra* note 43, 518 F.2d at 1196, and *Green* v. *Laird*, 357 F.Supp. 227, 230 (N.D. Ill. 1973), suggest that service on the United States renders ineffective otherwise proper service on a federal officer, we refuse to follow them. Moreover, *Relf* v. *Gasch*,

changes were to affect some cases controlled by Section 1391(e) and not others,[59] and indeed any exception would be difficult to justify. That venue exists in a particular district would hardly console a plaintiff unable to serve officials who, though responsible for his plight, had withdrawn beyond the limits of effective service. And Congress must not have been content to rely simply on state long-arm statutes,[60] for it chose to supplement them in the category of cases encompassed by Section 1391(e) by providing extraterritorial service of its own device.[61] We find the service effected here to be fully within the ambit of congressional contemplation.

Nor do we perceive any constitutional problem in the statute as applied to this case.[62] Appellees pitch their

supra note 44, 167 U.S. App. D.C. at 242 n. 18, 511 F.2d at 808 n. 18, in no way conflicts with our interpretation. As we noted earlier, see notes 44-52 *supra* and accompanying text, our concern in *Relf* was that § 1391(e)—and Rule 4(d)(5)—did not extend to claims against officials sued as individuals, as opposed to claims deriving from action taken under color of legal authority.

59. See note 58 *supra*.

60. The District Court apparently gauged its jurisdiction by the local long-arm statute, D.C. Code § 13-423(a) (1973), and found it wanting. See note 15 *supra*. Precisely what measurement it undertook is unclear. If it assumed that its only vehicle for obtaining service was *via* that statute, it was, as indicated above, in error. If its reference was for the purpose of determining whether appellees had sufficient contacts with the forum to permit it constitutionally to exercise jurisdiction over them—the more likely possibility—it was similarly incorrect. See text and notes at notes 62-75 *infra*.

61. See H.R.Rep.No.536, *supra* note 36, at 4.

62. Appellees do not assert that service *via* certified mail is any less valid than personal service. Therefore, we do not pass on the question but merely note that the weight of authority might sustain the use of certified mail service in *in personam* actions such as this. Compare *Hess* v. *Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), with *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1908). See also *McGee* v. *International Life Ins. Co.*,

constitutional argument on their supposed lack of minimum contacts with the District of Columbia,[63] resting on cases[64] holding "that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries."[65] To the extent that this position presupposes that Congress' constitutional authority to provide for the sound operation of the federal judicial system[66] is limited by the same constraints that apply to extraterritorial service by state tribunals, it builds on

355 U.S. 220, 221, 78 S.Ct. 199, 200, 2 L.Ed.2d 223, 225 (1950); *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 318-319, 70 S.Ct. 652, 656-660, 94 L.Ed. 865, 875-876 (1957). See generally Fox, *Motorists' Service of Process Acts*, 33 F.R.D. 151 (1963); Wilson, *Service of Process*, 39 U.Cinn.L.Rev. 487, 488-489 (1970); Note, *Service of Process by Mail*, 74 Mich.L.Rev. 381, 382 (1975) ("Service by mail without a return-receipt requirement complies with . . . due process").

63. Appellants, who pleaded, *inter alia*, a conspiracy between appellees and Goodwin, see note 7 *supra*, take the position that discovery would reveal that appellees did have substantial contacts with the District of Columbia, Brief for Appellants at 10 and footnote, but that they were prevented from conducting discovery during the pendency of appellees' motion to dismiss. *Id.* at 6. Since we do not accept appellees' lack-of-contacts contention, we need not pass on this question.

64. *Hansen* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90L.Ed. 95 (1945).

65. *McGee* v. *International Life Ins. Co.*, *supra* note 62, 355 U.S. at 222, 78 S.Ct. at 200, 2 L.Ed.2d at 225. *Cf. Hansen* v. *Denckla*, *supra* note 64, 357 U.S. at 253, 78 S.Ct. at 1240, 2 L.Ed.2d at 1298 ("it is essential [to state court or diversity jurisdiction] in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities wihtin the forum State, thus invoking the benefits and protection of its laws").

66. See *Hanna* v. *Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8, 17 (1965).

sandy soil indeed. Whether or not Article III[67] mandated creation of any inferior federal courts at all,[68] it is a matter of general agreement that the discretion of Congress "as to the number, the character, [and] the territorial limits" of the inferior federal courts is not limited by the Constitution.[69] Congress might have established only one such court, or a mere handful;[70] in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution.[71] That it was considered expedient to estab-

67. U.S.Const. art. III § 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

68. Compare *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245, 11 L.Ed. 576, 581 (1845), with *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-331, 4 L.Ed. 97, 104 (1816). Compare J. Goebel, History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, 246-247 (1971), with 1 Records of the Federal Convention of 1787, 124-127 (M. Ferrand ed. 1966). See also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49, 65-67 (1923).

69. *United States* v. *Union Pac. R. R. Co.*, 98 U.S. (8 Otto) 569, 602-603, 25 L.Ed. 143, 150 (1878). Accord, *Lockerty* v. *Phillips*, 319 U.S. 182, 187, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339, 1342-1343 (1943); *Cary* v. *Curtis*, *supra* note 68, 44 U.S. at 245, 11 L.Ed. at 581. *Cf.* J. Goebel, *supra* note 68, at 247; 1 The Records of the Federal Convention of 1787, *supra* note 68, at 125.

70. See, *e.g.*, *Marlin* v. *Hunter's Lessee*, *supra* note 68, 14 U.S. at 331, 4 L.Ed. at 104. The early drafts of what became Article III provided for "one or more" inferior federal courts, but that provision was stricken without apparent explanation. 1 Records of the Federal Convention of 1787, *supra* note 68, at 116. See J. Goebel, *supra* note 68, at 210 n. 68. Indeed, The Federalist No. 81 (A. Hamilton) 544 (p. Ford ed. 1898) proposed that Congress "divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state."

71. See, e.g.,*Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 442, 66 S.Ct. 242, 245, 90 L.Ed. 185, 190 (1946); *Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619, 622, 45 S.Ct. 621, 622, 69 L.Ed. 1119, 1121, (1925); *United States* v. *Union Pac. R. R. Co.*, *supra*

lish federal judicial districts in harmony with state boundaries[72] did not alter the scope of legislative discretion in this regard, and in fact Congress has, on occasion, provided for nationwide service.[73] While several cases have asserted apodictically that service outside a federal judicial district is governed by the same sort of "fairness standard" as is extraterritorial service by state courts,[74] this imputes

note 69, 98 U.S. at 604, 25 L.Ed. at 151 ("[t]here is . . . nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a . . . court . . . in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 328, 9 L.Ed. 1093, 1105 (1838).

72. The Judiciary Act of 1789, 1 Stat. 73 (1789), divided the United States into districts along state lines, except for establishment of districts in the Maine and Kentucky territories. This decision appears to have been motivated in part by the very spectre of nationwide service and the attendant inconvenience it might have caused. See J. Goebel, *supra* note 68, at 226, 460, 473; Warren, *supra* note 68, at 72. Thus, "a precedent was established, which is still unbroken [with but one exception, see Act of Feb. 13, 1801, ch. 4, §§ 4, 21, 2 Stat. 89, 96, repealed Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132] against the overlapping of state lines in the boundaries of federal judicial districts." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and the Federal System 33 (2d ed. 1973).

73. See, *e.g.*, the instances cited in *Robertson* v. *Railway Labor Bd.*, *supra* note 71, 268 U.S. at 624-625, 45 S.Ct. at 623-624, 69 L.Ed. at 1122; *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F.2d 508, 512 (2d Cir. 1960); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1125 at 522-528 (1968); Comment, 7 Rut.Cam.L.J. 158, 162 n. 7 (1975).

74. *E.g.*, *Fraley* v. *Chesapeake & O. Ry.*, 397 F.2d 1, 3 (3d Cir. 1968); *Lone Star Package Co.* v. *Baltimore & O. R. R.*, 212 F.2d 147, 155 (5th Cir. 1954). *Fraley* relies on *Lone Star*, which in turn relies on *United States* v. *Scophony Corp.*, 333 U.S. 795, 818, 68 S.Ct. 855, 866, 92 L.Ed. 1091, 1106 (1948), applying the "fairness considerations" of *International Shoe Co.* v. *Washington*, *supra* note 64, to a determination as to whether a British corporation could be subjected to suit in the United States. Whether an alien is amenable to suit in this country is, as Professor Rheinstein has noted, a ques-

a constitutional magic to lines that Congress can at any time redraw. As tradition alone[75] works no such necromancy, we must reject appellees' constitutional argument as well.

III

We are requested by appellees at least to temper our view of the involved statute by its purportedly pernicious repercussions. Our answer must naturally be that it was for Congress alone to weigh those repercussions. Congress may not have anticipated that the flow of litigation of the sort at bar would rise from trickle to floodtide;[76] still we may not distort the statute to mollify its operation. If, as appellees melodramatically contend, application of Section 1391(e) as written "would subvert the orderly administration of the criminal justice system,"[77] it is Congress that should be alerted, for we are not at liberty to act on its stead.

To sum up, Section 1391(e)(1), providing as it does for venue in actions for redress of injuries inflicted by federal officials under color of legal authority, supports cognizance

---

tion analogous to that presented when a state court attempts to exercise jurisdiction over someone not found in that state, and quite a different matter from applying such a test to a sovereign state's power to formulate jurisdictional tenets within its territorial limits. Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U.Chi. L.Rev. 775, 786-787, 796 (1955). *Cf. Shaffer* v. *Heitner*, 433 U.S. 186, 197-198, 97 S.Ct. 2569, 2576-2577, 53 L.Ed.2d 683 (1977).

75. See note 72 *supra*.

76. It has been noted that between 1961 and 1970 the number of civil rights actions filed in federal courts increased 1346%—from 296 to 3,985. H. Friendly, Federal Jurisdiction—A General View 16 (1973).

77. Brief for Appellees at 26.

of this litigation in the District of Columbia. That section also sanctions the use of certified mail for extraterritorial service in this action, and as so applied is constitutional. These conclusions require us to reverse the District Court's dismissal of appellants' action against Messrs. Stafford, Carrouth and Meadow, and to remand the case for further proceedings.

• • •

APPENDIX B

JOHN BRIGGS et al., Plaintiffs,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, Division of Internal Security, et al., Defendants.

CIV. A. No. 74-803.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA.

Nov. 20, 1974.

• • •

MEMORANDUM AND ORDER

AUBREY E. ROBINSON, JR., District Judge.

In this civil action, Plaintiffs seek declaratory relief and damages for alleged violations of their constitutional rights which arose from the criminal case of United States v. Briggs, G.C.R. 1353 (the "Gainesville 8" case) in which eight of the Plaintiffs herein were acquitted of conspiracy. The Defendants Guy Goodwin, William H. Stafford, Jr. and Stuart J. Carrouth are attorneys with the Department of Justice and were responsible for conducting the investigation, the grand jury proceedings and the prosecution of that case. Defendant Claude Meadow is a special agent of the Federal Bureau of Investigation and was also involved in the investigation.

After the Plaintiffs served a notice to take the deposition of Defendant Guy Goodwin, remaining Defendants moved for a transfer of venue and for a stay of the deposition

pending a ruling on their motion for transfer. In the alternative, Defendants Stafford, Carrouth and Meadow moved to dismiss and for a stay of Defendant Goodwin's deposition pending the filing of and a determination on a Motion to Dismiss as to Defendant Goodwin on the grounds of immunity. On July 19, 1974, this Court ordered that the deposition of Defendant Goodwin be stayed pending a determination on the question of his immunity from prosecution, without prejudice to the pending motions of the other Defendants.

The Court finds that the Motion to Dismiss filed by Defendant Guy Goodwin and the Motion to Transfer this case to the Northern District of Florida filed by Defendants Stafford, Carrouth and Meadows are both ripe for determination. For reasons explained hereinafter, both Motions must be denied.

In their Complaint, Plaintiffs have alleged that Defendant Goodwin violated their constitutional rights by committing perjury when questioned under oath by a United States District Judge concerning the presence of government informants in the "defense camp". Relying upon two recent cases from the Third Circuit and several earlier cases from the Second and District of Columbia Circuits, Defendant Goodwin moves to dismiss the Complaint as to him. He contends that as a special attorney of the United States Department of Justice and federal prosecutor, he is absolutely immune from any damage claim based upon his alleged misconduct while acting in his official capacity.

Plaintiffs oppose this Motion and contend that the doctrine is inapplicable on the grounds that the alleged misconduct in this case is beyond the scope of any official duty and is in violation of federal law. Plaintiffs rely upon recent cases from the Fourth, Sixth and Seventh Circuits which reject absolute immunity and adopt a qualified

immnuity for prosecutors. They contend that the recent case of Apton v. Wilson, 165 U.S.App.D.C. —, 506 F.2d 83 (1974), No. 73-1614, decided August 16, 1974, indicates a trend in this Circuit toward adopting this developing analytical view of the doctrine.

After careful analysis of the numerous cases cited by counsel in this action, the Court concludes that Defendant Goodwin's Motion to Dismiss for failure to state a claim upon which relief can be granted based upon absolute prosecutorial immunity must be denied at this juncture.

As the cases indicate, the doctrine of immunity for quasi-judicial officers like prosecutors derives from the fact that in the course of performing their official duties, they often exercise a discretion similar to that exercised by judges. The Courts have reasoned that to ensure vigorous and effective enforcement of the laws, prosecutors should be protected from possible vindictive lawsuits arising from their activities in performing that function. This need for freedom from procedural constraints in performing their discretionary functions and the built-in safeguards within the judicial process to check misconduct are together considered justification for extending the judicial immunity doctrine to prosecutors.

However, several recent cases indicate that this "quasi-judicial" immunity is not absolute. Scheuer *v.* Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Apton, *supra,* Robichaud *v.* Ronan, 351 F.2d 533 (9th Cir. 1965); Lewis *v.* Brautigam, 227 F.2d 124 (5th Cir. 1955); Hilliard *v.* Williams, 465 F.2d 1212 (6th Cir. 1972), cert. denied, 409 U.S. 1029, 93 S.Ct. 146, 34 L.Ed.2d 322 (1972). These cases indicate a growing trend toward determining the applicability of quasi-judicial immunity by analyzing the nature of the activity being performed. Where performing functions closely aligned with the judicial process such as presenting evidence to the grand jury or prosecuting at trial, prosecutors still enjoy absolute immunity. But as the nature of the activity moves further from the judicial process, the Courts have held that immunity becomes less functional and is therefore not absolute.

The Defendants reasonably rely upon Cooper *v.* O'Connor, 69 App.D.C. 100, 99 F.2d 135 (1938) and Laughlin *v.* Garnett, 78 U.S.App.D.C. 194, 138 F.2d 931 (1943) as authority for their contention that this jurisdiction follows the theory of absolute immunity. However, the Court reads the more recent case of *Apton, supra,* which interprets *Scheuer, supra,* as indicating a trend in this Circuit to adopt an analytical approach to and a more restrictive application of the doctrine of quasi-judicial immunity. Although these recent cases are factually distinguishable from the case at hand, the reasoning of the opinions indicates to this Court that assertions of quasi-judicial immunity cannot be rigidly accepted on their face, but rather an analysis of the activity being performed at the time the alleged misconduct occurred is required to determine the applicability of the doctrine.

Where, as in this case, a prosecutor is alleged to have committed perjury, an activity beyond the scope of his authority, in clear violation of law and far removed from the discretionary areas of the judicial process traditionally protected by the quasi-judicial immunity doctrine, the Court concludes that this doctrine is not applicable. Therefore, Defendant Goodwin's Motion to Dismiss on these grounds must be denied.

In addition, the Court concludes that the Motion to Transfer this action in accordance with 28 U.S.C. § 1404

and § 1406 filed by Defendants Stafford, Carrouth and Meadows must also be denied. Title 28 U.S.C. § 1391 (e)(1) provides that proper venue lies where a Defendant in the action resides. Since Defendant Goodwin's Motion to Dismiss has been denied, and he remains in this action, the Court finds venue proper in this District. It is well established law that a plaintiff's choice of venue is given preference and the burden of establishing that an action should be transferred is on the moving party. 1 Moore's Federal Practice § 1.145[5]. The Court finds that Defendants here have failed to meet that burden, and thus their Motion to Transfer to the Northern District of Florida must be denied.

Upon the above considerations, it is by the Court this 20th day of November, 1974;

Ordered, that Defendant Guy Goodwin's Motion to Dismiss this action be and hereby is denied; and it is

Further ordered, that the Motion to Transfer filed by Defendants Stafford, Carrouth and Meadows, be and hereby is denied.

• • •

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 74-803

JOHN K. BRIGGS, ET AL.,

Plaintiffs,

v.

GUY GOODWIN, ET AL.,

Defendants.

ORDER

Upon consideration of the Alternative Motion of Defendants Stafford, Carrouth and Meadow to Dismiss this Action as to them for Lack of Jurisdiction over their Persons, Improper Venue, Insufficiency of Process and Insufficiency of Service of Process, the memoranda of points and authorities in support thereof and in opposition thereto, it appearing to the Court that service of process upon said defendants was made by certified mail; that the Complaint fails to allege the defendants transacted any business in the District of Columbia or caused tortious injury to plaintiffs in the District of Columbia by an act or omission therein as required by District of Columbia Code § 13-423(a); that the action against said defendants could not have been brought in this Court prior to the enactment of 28 U.S.C. § 1391(e) and is not one in essence against the United States as

required by § 1391(e); and that by reason thereof the Court lacks venue and *in personam* jurisdiction with respect to defendants Stafford, Carrouth and Meadow, service of process on them was insufficient, and the action as to these defendants should be dismissed, it is, therefore, by the Court this 4th day of March 1975:

ORDERED that the Alternative Motion of Defendants Stafford, Carrouth and Meadow to dismiss this action be, and the same hereby is, granted; and it is further

ORDERED that this action be, and the same hereby is, dismissed as to defendants William H. Stafford, Jr., Stuart J. Carrouth, and Claude Meadow.

Dated: March 4, 1975

AUBREY E. ROBINSON, JR.
s/.....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-803

JOHN BRIGGS, *et al.*,
Plaintiffs,

v.

GUY GOODWIN, individually and as Attorney for the Department of Justice, Division of Internal Security, *et al.*,
Defendants.

ORDER OF FINAL JUDGMENT AS TO DEFENDANTS STAFFORD, CARROUTH AND MEADOW

On the prior Order of this Court entered March 4, 1975 dismissing this action as to defendants William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow, it appearing to the Court that there is no just reason for delay in the entry of final judgment on said Order, and the Court expressly so determines, it is, therefore, by the Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this 4th day of April, 1975:

ORDERED that final judgment be, and the same hereby is, entered on said Order of March 4, 1975 dismissing this action as to defendants William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19
No. 75-1578—Civil 74-803

JOHN BRIGGS, ET AL.,

Appellants,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, ET AL. [STAFFORD, ET AL.]

APPEAL FROM the United States District Court for the District of Columbia.

BEFORE: McGOWAN, ROBINSON and WILKEY, Circuit Judges

JUDGMENT

THIS REVUE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment ..... of the District Court appealed from this cause is hereby reversed and the case is remanded to the District Court for further proceedings in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:
GEORGE A. FISHER
George A. Fisher, *Clerk*

Date: September 19, 1977

Opinion for the Court filed by Circuit Judge Robinson

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed Sep 21 1977

GEORGE A. FISHER, *Clerk*

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1578
Civil Action #74-803

JOHN BRIGGS, *et al.*,

Appellants,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, *et al.*

BEFORE: McGowan, Robinson and Wilkey, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellees Guy Goodwin, et al, and it appearing that appellees filed a motion to lodge documents in connection with the petition for rehearing, it is

ORDERED by the Court that appellees' motion to lodge documents is granted and the Clerk is directed to lodge said documents, and it is

FURTHER ORDERED by the Court that appellee's petition for rehearing is denied.

Per Curiam
For the Court:
GEORGE A. FISHER, *Clerk*

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1578
Civil Action #74-803

JOHN BRIGGS, *et al.*,

Appellants,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, *et al.*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellees Guy Goodwin, et al, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-699

WILLIAM H. STAFFORD, JR., ET AL.,

Petitioners,

v.

JOHN BRIGGS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 30, 1978.

THE CHIEF JUSTICE

.....

Chief Justice of the United States

Dated this 23rd day of February, 1978

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 1450

RICHARD BERTOLI,

Plaintiff,

—against—

THE SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

MEMORANDUM AND ORDER

OWEN, District Judge

Before me are three motions. The first is by defendants to dismiss plaintiff's complaint seeking declaratory and injunctive relief, as well as damages, as a result of allegedly illegal searches and seizures conducted at various offices in New York and New Jersey in violation of plaintiff's fourth amendment rights. The second and third motions are cross motions having to do with discovery, pro and con.

Turning to the first motion and the declaratory relief sought in this case—that any use in connection with a civil or criminal investigation or prosecution of information garnered or materials seized from the various locations in New Jersey and New York in alleged violation of plaintiff's fourth amendment rights is illegal—it is essentially equivalent to the injunctive relief sought, that is, a prohibition

against the use of any such information or materials. A grant of declaratory or injunctive relief would in these circumstances have substantially the same effect as an order pursuant to Fed. R. Crim. P. 41(e) for the return of the seized property, which I am denying in a separate memorandum and order because of a related criminal indictment against plaintiff pending in the District of New Jersey.

It would be a manifest abuse of discretion for this court to exercise jurisdiction over the requests for injunctive and declaratory relief where, as here, to do so would necessarily be to interfere with criminal proceedings pending in another federal judicial district. *See Smith* v. *Katzenbach,* 351 F.2d 810, 816 (D.C. Cir. 1965). Accordingly, defendants' motion to dismiss plaintiff's first two prayers for relief, denominated XIII(a) & (b) in the complaint, is granted.

Plaintiff's allegation of $2,000,000 damages is based on the theory of *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).[1] The named defendants move to dismiss it on the ground that the complaint fails to state a claim upon which relief may be granted, and defendants Johnathan L. Goldstein, the United States Attorney for the District of New Jersey at the time the complaint was filed, and Charles J. Walsh, an employee of the United States Attorney for the District of New Jersey, claim in addition that the court lacks personal jurisdiction over them for purposes of the *Bivens* claim because they were not served

1. Plaintiff maintains that the facts pleaded in the complaint also state a claim for relief under 42 U.S.C. §§ 1985(3) & 1986. There is no merit to this claim. At the minimum, there must be an allegation, which is lacking here, of some "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (1971) (footnote omitted). In addition, these sections of Title 42 are inapplicable to federal officials acting under color of federal law. *Williams* v. *Halperin,* 360 F. Supp. 554, 556 (S.D.N.Y. 1973).

within the state and the complaint fails to state facts upon which the court could assert long-arm jurisdiction over them pursuant to Fed. R. Civ. P. 4(e) and N.Y.C.P.L.R. § 302(a)(2).

The vice of plaintiff's complaint with respect to the *Bivens* cause of action against the eight named defendants associated with the SEC is that the complaint merely identifies them as "officials and employees of the SEC," and thereafter never refers to any of them again by name. Instead, plaintiff refers throughout to the "defendants" and the "defendants acting individually and/or in concert". With plaintiff alleging numerous illegal searches and seizures at various locations over a period of more than nine months, this type of pleading is obviously unfair and insufficient. It is impossible for any of the named defendants to know from the complaint exactly what he is being made to answer for, and where and when the actions complained of against him were taken.

In order to withstand a motion to dismiss a *Bivens*-based claim must assert as to each defendant—named or unnamed—his personal participation in the conduct complained of, *see, e.g., Buck* v. *The Board of Elections,* 536 F.2d 522, 524 (2d Cir. 1976), and just as in the case of a civil rights complaint brought under 42 U.S.C. § 1983 against a state official, liability may not be predicated merely upon the doctrine of *respondent superior. E.g., Black* v. *United States,* 534 F.2d 524, 527-28 (2d Cir. 1976); *Morpurgo* v. *Board of Higher Education,* 423 F. Supp. 704, 713-14 (S.D.N.Y. 1976).

Plaintiff's conclusory allegations of conspiracies to deprive him of his fourth amendment rights, lodged against these defendants without the pleading of overt acts committed by them in furtherance of the conspiracy, are also insufficient to state a claim for relief. *See Jacobson* v.

Organized Crime and Racketeering Section of the United States Department of Justice, 544 F.2d 637, 639 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977); *Powell* v. *Workmen's Compensation Board,* 327 F.2d 131, 137 (2d Cir. 1964).

Against these standards it is plain that plaintiff has failed to state a *Bivens* claim upon which relief may be granted against the eight defendants assertedly associated with SEC.

Of course, the foregoing applies equally well to defendants Goldstein and Walsh. In addition, the allegations made specifically against them on information and belief, see ¶¶ 11 and 53 of the complaint, suffer from the same infirmity previously discussed—lack of specificity.

Lastly, plaintiff relies on 28 U.S.C. § 1391(e) as conferring personal jurisdiction on this court over defendants Goldstein and Walsh. This section, however, only controls venue once personal jurisdiction and jurisdiction over the subject matter are independently established. *United States ex rel. Rudick* v. *Laird,* 412 F.2d 16, 20 (2d Cir.), *cert. denied,* 396 U.S. 918 (1969). Since defendants Goldstein and Walsh were not served in the Southern District of New York and the conclusory allegations of conspiracy or agency are insufficient to confer long-arm jurisdiction over them under N.Y.C.P.L.R. § 302, *see Lehigh Valley Industries, Inc.* v. *Birenbaum,* 527 F.2d 87, 89&n.1, 93-94 (2d Cir. 1975), this court must dismiss the *Bivens* claim against them on the additional ground of lack of personal jurisdiction.

Plaintiff has recently apprised the court in an unverified letter of the names of several of the persons alleged by him to have actually committed the searches and seizures complained of. Accordingly, plaintiff will be given leave to replead against those whom he can properly charge by

name, and plaintiff will also be afforded discovery to the extent necessary to learn who else, if anyone, was on the premises allegedly controlled by him and in violation of his fourth amendment rights.

However, since a substantial criminal prosecution is facing plaintiff in the District of New Jersey, and since many, including potentially dispositive threshhold issues in the *Bivens* action will no doubt be determined in the New Jersey prosecution, this court will defer further proceedings in the instant case until after the pending criminal charges in the District of New Jersey have been resolved, both in the interest of judicial economy, *see United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 204 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968), and also to protect the government from having to comply with discovery demands of plaintiff in a civil suit as an expedient to circumvent the more restrictive discovery applicable rules in criminal cases, *e.g.*, *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). *See United States* v. *Kordel*, 397 U.S. 1, 12 n.27 (1970). Thus, plaintiff's motion for an order compelling defendants to answer his interrogatories is also denied, without prejudice.

In sum, plaintiff's claims for declaratory and injunctive relief are dismissed, the *Bivens* claim against all ten named defendants is dismissed without prejudice and with leave to replead, provided, however, that further proceedings, including repleading pursuant to leave, are deferred pending the outcome of plaintiff's trial on criminal charges in the District of New Jersey.

Submit order on notice.

November 4, 1977.

R. Owen
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

For the Western District of Texas
El Paso Division

No. EP-77-CA-35

Ilse M. Sigler, *et al*,
Plaintiffs,

v.

Major General C. J. Levan, *et al*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs have filed the instant Complaint alleging that the Defendants, individually and acting in combination, conspiracy and concert of action, either murdered Ralph J. Sigler or placed him in a position of extreme danger and failed to protect him, in violation of the Fifth Amendment to the Constitution of the United States of America, and that the Defendants, individually and acting in combination, conspiracy and concert of action, did, in violation of the Fourth Amendment to the Constitution of the United States of America, unlawfully seize the papers, personal property, and memorabilia of Ralph J. Sigler. Plaintiffs allege that the Defendants, in committing such actions, were acting in their official capacity or under the color of legal authority.

I.

Plaintiffs' Complaint asserts that this Court has venue of this action under 28 U.S.C. § 1391(b) and (e). Those provisions are:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
>
> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the Rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." 28 U.S.C. § 1391.

Defendant, MAJOR GENERAL C. J. LEVAN, has moved the Court to dismiss Plaintiffs' claim against LEVAN asserting, among other things, that Section 1391 does not authorize maintenance of this suit in the Western District of Texas. LEVAN contends specifically that Plaintiffs' asserted basis for venue, Section 1391(4) does not apply to a suit against an individual officer of the United States when that suit

requests relief in the form of money damages for defendant's individual action.

II.

Plaintiffs' claim can be summarized as a claim for relief based on two separate theories. First, Plaintiffs claim monetary damages resulting from the death of Ralph J. Sigler because of Defendants' alleged violation of Ralph J. Sigler's rights under the Fifth Amendment to the Constitution of the United States of America. Second, Plaintiffs seek to recover Ralph J. Sigler's papers, chattels, and memorabilia allegedly wrongfully taken from Ralph J. Sigler in violation of his rights under the Fourth Amendment to the Constitution of the United States of America. Plaintiffs' first claim is for monetary relief and their second claim is in the form of a request for a mandatory injunction.

III.

Defendant LEVAN contends that 28 U.S.C. § 1391(e) is inapplicable to an action against a Government official for monetary damages. Defendant argues that, although the literal reading of the statute provides venue in a district where the plaintiffs reside, that provision cannot be read literally, but must be read in conjunction with 28 U.S.C. § 1361, providing the District Court of the United States with jurisdiction over mandamus proceedings against a Government official.

Plaintiffs respond with the contention that Section 1391(e)(4) provides a basis for venue as it makes no distinction between actions in the nature of injunction and mandamus on one hand and actions for monetary damages on the other hand.

IV.

In support of his argument that Section 1391(e) is inapplicable to Plaintiffs' cause of action seeking monetary relief, Defendant relies most heavily on the case of *Natural Resources Defense Counsel, Inc.* v. *Tennessee Valley Authority,* 459 F.2d 255 (2nd Cir. 1972). In *Natural Resources,* plaintiff, a New York resident, sued a defendant whose residence was established by federal statute in Alabama. Plaintiff sought to maintain venue in New York, (plaintiff's residence), under 28 U.S.C. § 1391(3)(4). Defendant moved to dismiss the claim for lack of proper venue, contending that Section 1391(e) was not intended to apply to an action against a locally based federal business corporation such as the TVA, but only to actions against federal officers or agencies which, prior to enactment of Section 1391(e) could have been brought only at the seat of federal government, in the district court for the District of Columbia.

In ruling that Section 1391(e) did not provide a basis for venue of plantiff's claim, Chief Judge Friendly made a searching analysis of the history and purpose behind that section. Section 1391(b) was only a part of the Congressional enactment of Public Law No. 87-748, 87th Congress (1961). The companion statute is codified as 28 U.S.C. § 1361, which gives the United States District Court original jurisdiction of actions in the nature of mandamus to compel an officer or employee of the United States or any agency of the United States to perform a duty owed to the plaintiff. The Judicial Subcommittee to which the original bill was referred reported as follows:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in the United States District Courts outside the

> District of Columbia, on jurisdiction and venue, may now be brought only in the U.S. District Court of the District of Columbia." H.R. Rep. No. 536, 87th Congress, First Session, page 1.

The need for such legislation arose from the decision in *McIntire* v. *Wood,* 11 U.S. (7 Cranch) 504, 3 L.Ed. 420 (1813), denying to the lower federal courts mandamus jurisdiction over federal officers, with the exception of mandamus actions maintained in the District of Columbia. *Kendall* v. *United States ex. rel. Stokes,* 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838). In addition to the unavailability of the federal district court for mandamus actions, injunctions were permissible only when the superior officer in Washington was not an indispensable party, as he was the individual who would be required to take the action requested by the injunction. *Williams v. Fanning,* 332 U.S. 490, 493, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947).

The decision in *Natural Resources* was based on the opinion of the United States Court of Appeals for the Second Circuit that the specific purpose of Section 1391(e) was to broaden the venue of civil actions which should have previously been brought only in the District of Columbia. *Id.* at 259. The Court concluded that, since the TVA could, prior to the enactment of Section 1391(e), be sued outside the District of Columbia, Section 1391(e) was inapplicable to an action against the TVA. The TVA had always been subject to suit, with the same venue limitations as other corporations in any district in which it did business. *Id.* at 259.

Defendant Levan concludes, therefore, that an action against a federal employee in his individual capacity, seeking the remedy of monetary damages, is not governed by Section 1391(e), as it is not the type of action which could

previously have been brought only in the District of Columbia.

V.

Plaintiffs contend that the law in Fifth Circuit, as evidenced by *Ellinburg* v. *Connet,* 457 F.2d 240 (5th Cir. 1972), dictates that Section 1391(e)(4) provides venue in the district of plaintiff's residence for a cause of action against a federal employee in his individual capacity, seeking monetary relief.

In *Ellinburg,* petitioner was a prisoner at Texarkana, Texas, within the Eastern District of Texas. Petitioner filed a petition for mandamus against several prison officials residing in Texarkana, requesting that the Court order the defendant (1) to remove detainers against the petitioner, (2) to drop the practice of opening Petitioner's mail, (3) to grant petitioner the "minimum custody" status, (4) to stop spying on the prisoners, and (5) to refrain from serving unequal portions of food to different prisoners. The trial court dismissed the petition, saying that it was a habeas corpus petition which must be brought in the district where the prison was located.

The United States Court of Appeals for the Fifth Circuit concluded that the district court was erroneous in characterizing the petition as a habeas corpus petition, holding that it was a petition in the nature of mandamus. The Court then looked to each of the specific venue alternatives under Section 1391(e). Subsection 1 thereof provides that the action may be brought in a district where a defendant resides. None of the defendants resided within the Northern District; therefore, venue was not proper under Subsection 1.

Subsection 2 provides that venue is properly laid where a cause of action arises. Plaintiff's complaint did not state

that any cause of action arose within the Eastern District of Texas; therefore, venue under Subsection 2 was not proper.

Subsection 3 provides venue only in a case where real property is involved. The Court concluded that Subsection 3 was inapplicable.

Subsection 4, providing venue in the place of plaintiff's residence, gave rise to the Fifth Circuit's surmise that venue may properly have been laid in the Northern District of Texas. The Court noted that, although petitioner was incarcerated in Texarkana, within the Eastern District of Texas, the record did not adequately show whether petitioner may actually have been a resident of the Northern District of Texas. The Court remanded the case to the trial court for a determination of whether plaintiff was a resident of the Northern District.

The opinion in *Ellinburg* is lacking in analysis of the purposes and history of Section 1391(e). The Court did not differentiate between a claim for monetary damages and a request for mandamus. It is clear from a reading of the *Ellinburg* opinion that plaintiff's original petition contained requests for mandamus and injunctive relief. If monetary damages were requested, that request was clearly incidental to plaintiff's primary remedial request.

The main thrust of the *Ellinburg* opinion was that the trial court failed to consider all possibilities for appropriate venue, and should have been more deliberate in broadly construing the pro se complaint of the petitioner.

Plaintiffs cite several district court cases in support of the proposition that Section 1391(e)(4) provides venue in the district of plaintiff's residence in a suit requesting monetary relief.

Lowenstein v. *Rooney,* 401 F.Supp. 952 (E.D.N.Y. 1975) was an action against government officials in Washington,

alleging that those officials took action in Washington, D.C., to conspire against the plaintiff and cause him to lose a Congressional election. Plaintiff's complaint sought declaratory and injunctive relief as well as damages.

In determining that venue was properly laid in New York, the district of plaintiff's residence, the Court cited legislative history to the effect that Section 1391(e)(4) applied to an action where the defendant was allegedly "acting within the apparent scope of his authority and not as a private citizen." H.R. 1960, 87th Congress, First Session (1961); *Id.* at 962. The Court, however, undertook no analysis of the history or purpose of Section 1391(e), nor did it address the legislative history providing that the purpose of that section was to broaden the venue provision of those actions which previously could have been brought only in the District of Columbia.

The *Lowenstein* opinion is directly at odds with the opinion in *Natural Resources,* and does not attempt to distinguish *Natural Resources* or to be compatible with *Natural Resources,* although the Court rendering the *Lowenstein* decision is within the Second Judicial Circuit, the Circuit which rendered the *Natural Resources* opinion.

Plaintiffs also rely on *Briggs* v. *Goodwin,* 384 F.Supp. 1228 (D.D.C. 1974) and *Wu* v. *Kenny,* 384 F.Supp. 1161 (D.D.C. 1974). In *Briggs* plaintiff brought a suit against four government attorneys who had been in charge of a former criminal prosecution against the plaintiffs where plaintiffs had been acquitted. On a motion by the defendants to transfer the case from Washington, D.C. to North Carolina, the Court ruled that Section 1391(e) provided venue, as it was the place of residence of one of the defendants. There was no discussion of the legislative history of Section 1391(e). Additionally, the Court was not concerned, as is the Court in the instant case, with the subsection of Section 1391(e) dealing with venue in the place of Plaintiffs' residence. There was no discussion of the relief requested, and whether that relief was monetary or in the form of injunctive or mandatory relief. The Court merely concluded that the burden rested upon the Defendants to show reason why there should be a transfer, and that Defendants had failed to meet that burden. *Id.* at 1230.

In *Wu* the plaintiff sued the defendants for statements allegedly made by defendants, which statements lead to the denial of plaintiff's application for a grant from the National Endowment for Humanities. The summons and complaint were served upon the defendants in the manner provided in Section 1391(e), that is, by certified mail beyond the territorial limits of the district in which the action was brought. The Court rejected the defendants' contention that Section 1391(e) was inapplicable in a tort action for damages, and concluded that Section 1391(e) was applicable, since such actions were "probably not specifically contemplated by Congress," but appeared to fall within the literal bounds of Section 1391(e). *Id.* at 1168.

The continuing authority of *Briggs* and *Wu* is questionable in light of dicta from the United States Court of Appeals for the District of Columbia in *Relf* v. *Gasch,* 511 F.2d 804 (D.C. Cir. 1975), stating that Section 1391(e) applies only if a claim is stated against a federal officer in his official capacity; in actions involving a federal officer individually, the rule is not available. *Id.* at 808, n. 18.

VI.

The Court finds the decisions in cases limiting the applicability of Section 1391(e) to be the better-reasoned authority. These decisions thoroughly consider the legislative history of the statutes, analyze the historical inability

to proceed against government officials acting in their official capacity, and analyze the distinctions between the nature of the relief requested by Plaintiffs attempting to lay venue under Section 1391(e). *See Quinata* v. *Kelly.* 430 F.Supp. 1328 (E.D.Pa. 1977); *Rimar* v. *McCowan,* 374 F.Supp. 1179 (E.D.Mich. 1974); *Davis* v. *Federal Deposit Insurance Corp.,* 369 F.Supp. 277 (D.C.Colo. 1974); and *Holicky* v. *Selective Service Local Board No. 3,* 328 F.Supp. 1373 (D.C.Colo. 1971).

VII.

In Plaintiffs' claim for deprivation of Fifth Amendment rights, seeking monetary relief from the Defendants, all acts alleged to have been committed by the Defendants occurred outside the Western District of Texas. Plaintiffs do not claim that a cause of action arose, with respect to that cause of action, within the Western District of Texas. The allegations of Plaintiffs' Complaint are that Mr. Sigler reported, as ordered by the Defendants, to Ft. Meade, Maryland where he was subjected by the Defendants to extensive questioning and various types of threats and intimidations, the intent and effect of which was to force Mr. Sigler to end his own life.

Plaintiffs' asserted basis for jurisdiction is 28 U.S.C. § 1331(a), giving this Court jurisdiction over a cause of action arising under the Constitution of the United States of America. In such an action, when jurisdiction is not founded solely on diversity of citizenship, the appropriate venue is where all defendants reside, or where the claim arose, except as otherwise provided by law. Where Court to construe Section 1391(e), applying to actions against an officer of the United States, as allowing an action for monetary damages to be brought in the district of Plaintiffs' residence, the Court would be allowing Section 1391(e) to

expand the venue provision stated in Section 1391(b). In view of the legislative history of Section 1391(e), the Court concludes that it was not the intent of Congress to broaden venue in actions which could previously have been brought in any district wherein the claim arose.

Prior to the enactment of Section 1391(e), the Plaintiffs in this type of cause would not have been deprived of a forum at the place where the claim arose, as they would have been if the actions were one in the nature of mandamus or injunction. The Court concludes that it was not the intent of Congress to broaden venue provisions for an action requesting monetary damages, as such actions were not the evils at which Section 1391(e) was aimed.

An additional policy reason for refusing to allow a forum in the district of Plaintiffs' residence is the necessity of having government officials present in the places where they conduct their day-to-day activities. It is entirely proper to require a government official to be present at Court sessions and appear for Court proceedings in a district in which that official may have conducted illegal activity. However, to require a government official to be subject to suit at any point where a plaintiff may happen to reside, merely because that official may have conducted some activity in the Government's Capital, would be an undue burden on those persons who are responsible for Government operations.

The Court concludes, therefore, that the Western District of Texas is an improper place for the hearing of Plaintiff's claim against the Defendants for violation of Plaintiffs' Fifth Amendment rights claiming monetary damages from the Defendants.

VIII.

Defendant LEVAN does not consent the venue of Plaintiffs' claim for alleged deprivation of Fourth Amendment rights, which claim seeks relief in the nature of an injunction against the Defendants. That action is properly maintainable in the Western District of Texas, as it is the type of action at which Section 1391(e) was aimed.

IX.

The Western District of Texas is an appropriate venue for the maintenance of Plaintiffs' claim for violation of Ralph J. Sigler's Fourth Amendment rights, but is an improper venue for Plaintiffs' claim of Fifth Amendment violations.

Under the provisions of 28 U.S.C. § 1406(a), the Court, if it be in the interest of justice, may transfer a case to any district or division in which it could have been brought. The allegations of Plaintiffs' Complaint are to the effect that the wrongful death of Ralph J. Sigler occurred at Ft. Meade, Maryland, and that the Defendants' actions leading to Sigler's death were committed at Ft. Meade, Maryland. The Court will, therefore, transfer Plaintiffs' cause of action for violations of Fifth Amendment rights to the district court of Maryland.

Defendant LEVAN is the only one of the Defendants who has moved for dismissal for inappropriate venue. The parties have not briefed the question of transfer of the case against all Defendants.

The parties have not addressed the question of whether the Court should transfer the entire case, including the Fourth Amendment claim, in the interest of justice and for the convenience of parties and witnesses, pursuant to 28

U.S.C. § 1404(a). Under that section, the case may be transferred to any other district or division where it might have been brought. The parties have not briefed the question of whether Plaintiffs' claim of seeking the return of allegedly illegally seized documents might also have been brought in the district court in Maryland.

The Court, therefore, will withhold the transfer of the Fifth Amendment claim against Defendant LEVAN to the district court of Maryland, will withhold a determination of whether to transfer the Fifth Amendment claim against the other Defendants and will withhold a determination of whether to transfer the Fourth Amendment claim, pending receipt, from all parties in this cause, of briefs pertaining to whether the entire action pending in the Western District of Texas should be transferred to the district court in Maryland.

X.

IT IS THEREFORE ORDERED that all parties in this cause file with the Court, within twenty (20) days of this date, briefs addressing the issue of whether the Court should, in addition to transferring Plaintiffs' Fifth Amendment claim against Defendant LEVAN to the district court of Maryland, also transfer Plaintiffs' Fourth Amendment claim and Fifth Amendment claim against the other Defendants to the district court of Maryland, pursuant to 28 U.S.C. § 1404(a).

March 22, 1978

WILLIAM S. SESSIONS

William S. Sessions
United States District Judge

APPENDIX J

Pending cases of which petitioners are aware in which the questions presented are being or have recently been litigated.

1. Blair *v.* Baumgardner, Civil Action No. 77-C-390 (E.D. Wisc.)

2. Halkin *v.* Helms, Civil Action No. 75-1773 (D.D.C.)

3. The Black Panther Party *v.* Levi, Civil Action No. 76-2205 (D.D.C.)

4. Sigler *v.* LeVan, Civil Action No. EP77-CA 35 (W.D. Tex.)

5. Driver *v.* Helms, No. 77-1482 (1st Cir.)

6. Todd *v.* Brown, Civil Action No. 77-185-TUC-MAR (D. Ariz.)

7. Lamont *v.* Haig, No. 75-2006 (D.C. Cir.)

8. Guilday *v.* Department of Justice, Civil Action No. 4578 (D. Del.)

9. McCarthy *v.* Jonnard, Civil Action No. 77-695-A (E.D. Va.)

10. Misko *v.* United States, Civil No. 77-875 (D.D.C.)

11. Berlin Democratic Club *v.* Brown, No. 310-74 (D.D.C.)

12. Horman *v.* Kissinger, Civil Action No. 77-1748 (D.D.C.)

13. Mason *v.* Clayton, Civil Action No. 77-0995 (D.D.C.)

14. Bertoli *v.* SEC, 77 Civ. 1450 (S.D.N.Y.)

15. National Lawyers Guild *v.* Attorney General, 77 Civ. 999 (S.D.N.Y.)

16. LaRouche *v.* Kelley, 75 Civ. 6010 (S.D.N.Y.)

17. Clavir *v.* United States, 76 Civ. 1071 (S.D.N.Y.)

APPENDIX K

THE FEDERAL STATUTES CONTAINING PROVISIONS FOR NATIONWIDE SERVICE OF PROCESS

1. ***Actions under the Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361:*** The *res* is within the forum and is the subject matter of the litigation. It provides a fair basis for summoning the claimants into the forum to determine their respective rights thereto. See *Shaffer* v. *Heitner, supra,* at pp. 208-09, and n. 37.

2. ***Actions seeking to assert rights in property where the defendant cannot be served within the state or does not voluntarily appear, 28 U.S.C. § 1655:*** See paragraph 1 above.

3. ***Process against the corporation in a shareholder's action, 28 U.S.C. § 1695:*** The corporation in a derivative suit is a nominal party defendant and is the real party in interest on the plaintiff side. The nominal plaintiff has on behalf of the corporation selected the forum presumably having the best reach for the real defendants in mind.

4. ***Injunction actions by the United States under Section 5 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 5, 25:*** In antitrust conspiracy cases additional defendants may be summoned whether or not they reside in the district but only when the court finds *"that the ends of justice require"* [emphasis ours] that they be brought in. In these cases the out-of-state defendant must be added because it is claimed that he acted in combination with the in-state defendant or defendants already before the court. The combination in violation of the antitrust

laws must, at least at one end, have been committed in the forum state pursuant to the agreement of the out-of-state defendant.

5. *Actions against corporations under the antitrust laws, 15 U.S.C. § 22:* This statute specifically limits the districts in which suit can be brought to the district whereof the corporation is an inhabitant, may be found or transacts business. In any such instance the demands of due process are met since the corporate defendant would have "minimum contacts" with each such district.

6. *Actions in which a receiver is appointed and the land or other property of a fixed character, the subject of the action, lies within different districts, process may issue and be executed in any such district, 28 U.S.C. § 1692: See* paragraph 1 above.

7. *In certain actions under the interstate commerce laws pursuant to 28 U.S.C. § 2321 and 49 U.S.C. §§ 20, 23, 43:* Section 2321 of Title 28 applies only to actions brought by the United States (28 U.S.C. § 2322) to enforce Interstate Commerce Commission orders and permits process of district courts to run nationwide. ICC orders support a nationwide structure of operations adequate to meet the *International Shoe* test. ICC regulated carriers operate under licenses which may be properly made conditional upon a submission to nationwide jurisdiction. *Slaffer* v. *Heitner, supra* at 216.

8. *Actions by a national banking association under the provisions of chapter 2 of Title 12, to enjoin the Comptroller of Currency, or any receiver acting under his direction, First National Bank of Caton* v. *Comptroller of the Currency, 252 U.S. 504 (1919); 28 U.S.C. § 1394:* Such actions are brought to enjoin a banking official of the

United States with nationwide responsibilities and, by reason thereof, such official is "present" in the district of any bank subject to the exercise of his regulatory authority.

9. *Actions against officers of the United States, 28 U.S.C. § 1391(e):* This, of course, is the subject of this petition.

10. *Actions brought in the name of the United States on bonds of contractors for public buildings or works, 40 U.S.C. § 270(b):* Such suits on construction contract bonds are authorized in the district in which the contract was to be performed and executed. One who bonds such a contract would certainly have the necessary "minimum contacts" with the jurisdicion where the contract is to be performed.

11. *Actions brought under the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. §§ 77v(a), 78aa:* These statutes specifically limit the districts in which suit can be brought to the districts where the defendant is found, or is an inhabitant, or transacts business, or where an offer or sale of securities took place, if the defendant participated therein. In any such instance the demands of due process are met since the defendant would have "minimum contacts" with each such district.

12. *Actions under the Investment Company Act of 1940, 15 U.S.C. § 80a-43:* This statute specifically limits the district in which suit can be brought to the district where the defendant is an inhabitant or transacts business. The demands of due process are met since the defendant would have "minimum contacts" with such districts.

13. *Actions under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y: See* paragraph 12 above.

14. *Actions against the Secretary of Health, Education and Welfare to review benefits under the Social Security Act, 42 U.S.C. § 405(g): See* paragraph 8 above. In addition, such an action is "nominally" against the Secretary, and "in essence" against the United States.